

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
RICHARD W. NAGEL
CLERK OF COURT

2019 OCT 15 PM 2:29

LEWIS R. FOX, : CASE NO.: 2:19-cv-901
Petitioner, : JUDGE JAMES L. GRAHAM
-VS- : Magistrate Judge Kimberly A. Jolson
WARDEN, Belmont Corr. Inst., :
Respondent. :

MOTION TO SUPPLEMENT PETITIONER'S OBJECTION TO
"RESPONDENT'S OBJECTION TO THE MAGISTRATE'S R & R"

In response to the Respondent's "Notice of Repeat Service of Doc. 10-1," (Doc #13), this Petitioner respectfully request to Supplement his Objection (Doc #12, and Doc #11 by mistake (see letter attached to Doc #12)) to the now revised (original) "Respondent's Objection to the Report and Recommendation" (Doc #10) pursuant to Civil Rules of Fed. Procedure 15.

The issue before this Court is whether or not Petitioner's Claims should proceed as recommended by the Magistrate (Doc #9, ID @ 1051) or to over-rule the magistrate and dismiss per the objection of the Respondent for failure to exhaust (Doc #10, and Doc #13 (revised)).

After review of substantial dilatory short-comings of the State, this Petitioner wishes to redact the "In Lieu of...dismissing Claim #4 without prejudice" as stated in Doc #12 and proceed as Recommended by the Magistrate, notwithstanding, the already filed Doc #12 for the following reasons.

It is now the position of this petitioner that the State has attempted to sabotage this Petitioner's ability to appeal his post-conviction denial to the State's next level (appellate court). Not only has the State attempted a dilatory defense in trying to overcome the Magistrate's R & R (Doc #9) by

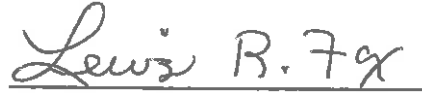
filing a "Renewed Answer and Motion to Dismiss [Petitioner's] Post-Conviction Petition," it did so by filing only after the Magistrate's R & R was filed. (See Case No.: 15CR-5585, Franklin County, Ohio, dated Sept. 4, 2019--Five (5) days after the Magistrate's R & R; See also Doc #12). In addition, the State dilatorily attempted to defeat Petitioner's ability to appeal his Post-Conviction by failing to inform him of such decision. As shown through several attached exhibits, the State (through its agents) nor the Court (through its agents) provided this petitioner with the trial court's decision denying post-conviction relief. To prove this matter, this Petitioner utilized the internal mail system called a "Kite," requested the mail logs of all incoming "Legal Mail" coincidentally called "Legal Mail Log." As attached, the legal mail log shows all incoming legal mail of this petitioner starting with: 09/04/19--mail from Office of the Clerk, this is/was the Magistrate's Report and Recommendation; Second, on 09/09/19--mail from the Franklin County Prosecutor, this is/was the "Renewed Answer and Motion to Dismiss..." requesting the trial Court to make a ruling on Petitioner's Post-Conviction Petition; Third, on 09/13/19--mail from Attorney General Yost's Office, this is/was the Objection to the Report and Recommendation--It failed to provide a copy of Exhibit "44" as stated "attached;" Fourth, on 09/23/19--mail from the Office of the Clerk, this was notice of Petitioner's objections to Respondent's Document No. 10. Also attached is a copy of the mailing envelopes and institutional mail passes (showing when petitioner's pass allowed him to pick up his legal mail) of Respondent's filings of Doc #10 and Doc #13. Petitioner would like to draw the attention to the postage for both envelopes--Doc #10, shows a postage of only \$0.50; where as, Doc #13, shows a postage of \$0.65--proof that Exhibit 44 was not originally attached. Also noticed by the Mail passes, the latest, petitioner asserts was Doc #13, the Repeat Service of #10-1 (which does now include Exhibit 44) was received by this Petitioner on October 1, 2019 (see Pass Date). Petitioner

has been foreclosed in the ability to perfect an appeal, not by his own doing, but by the State, regardless of intent or neglect. "Ohio does not permit delayed appeals in post-conviction proceedings..." *Nesser v. Wolfe*, 370 Fed. Appx. 665, 670. "This Court held in *Wright v. Lazaroff*, 643 F. Supp. 2d 971, 987-88 (S. D. Ohio 2009), both that failure to take such an appeal is a procedural default - the result of the failure is to prevent the state courts from considering the claim in accordance with their procedural rules - and that Ohio law does not allow a delayed appeal to be taken from the denial of a post-conviction petition." *Minor v. Warden, Belmont Corr. Inst.*, 2016 U.S. Dist. LEXIS 42321 (S. D. Ohio 2016). Unlike *Minor*, this petitioner's failure to file an appeal rest on the actions of the State. Regardless, a delayed appeal cannot be taken, no matter the circumstances. No remedies are available for this petitioner; and as explained to the Magistrate, petitioner request that exhaustion be excused or deemed exhausted instantly.

"Although there is a strong presumption in favor of requiring a state prisoner to pursue available state remedies, the failure to exhaust such remedies is not an absolute bar to appellate consideration of the merits of a habeas corpus petition." *Granberry v. Greer*, 481 U.S. 129. "([E]xhaustion should not be required 'whenever it may become clear that the alleged state remedy is nothing but a procedural morass offering no substantial hope of relief')." *Granberry* @ foot note 8 (citing *Marino v. Ragen*, 332 U.S. 561, 564 (1974))(Rutledge, J., concurring). To proceed in the State courts would be nothing more than a "procedural morass offering no substantial hope of relief."

Therefore, it is this petitioner's position that any attempt to return to the state courts would be futile; and in the interest of all parties, the continuance of this habeas corpus proceeding(s) should not fall victim to the State's dilatory tactics, but should proceed onward with all claims.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Lewis R. Fox". The signature is written in dark ink and is positioned above a horizontal line.

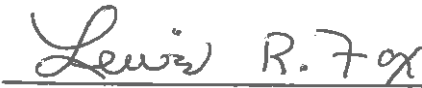
Lewis R. Fox, #733-986
P.O. Box 540
St. Clairsville, OH 43950

Pro Se

CERTIFICATE OF SERVICE

I, Lewis R. Fox, #733-986, do hereby certify that a true copy of this motion was sent to the Respondent of Record, Attorney General of Ohio, Assistant Maura O'Neill Jaite at Criminal Justice Section, 150 E. Gay Street, 16th Fl., Columbus, OH 43215 on or about the 5th day of October, 2019.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Lewis R. Fox". The signature is written in dark ink and is positioned above a horizontal line.

Lewis R. Fox, #733-986

Pro Se

DRC 2005 (Rev. 08-2014)

Name:	Lewis R. Fox	Date:	10-2-19
Unit:	733-986	Lock:	42
Assignment:	Student	3B	

10. Mail Room (Supervisor)

My name is Lewis R. Fox, #733-986. I am requesting a copy of all legal mail (transaction information--mail log information) that was sent to me from 09-1-19 to present date (10-5-19). There should be roughly only three to five entries. I need this information for legal purposes, appeals processes.

Sincerely,
Lewis R. Fox, #733-986

1. Check with your Secretary or Case Manager to see this communication can be handled without a kite.
2. Write only to the person(s) that handles the problem you have. Others will march forward with you.
3. State your problems clearly and completely and thereby get immediate attention.
4. Avoid duplication of Kites. Writing to more than one office about the same thing will not attract any faster attention.
5. Kites are to be used only for communication between unions and International Staff, and not for any other purpose.

Institution:
beci

NR07022 E / 1000000000

Institution:
beci[illegible]

Legal Mail Log

Institution:						
Date Received by Institution	Inmate Name	Inmate Number	Lock Assignment	Sender's Name & Address	Inmate's Signature of Receipt	Date of Receipt
09/13/2019						9-16-19
09/13/2019						9/16/19
09/13/2019						9/16/19
09/13/2019						9/16/19
09/13/2019						9/16/19
09/13/2019						9/16/19
09/13/2019						9/18/20
09/13/2019	Fox	A-733986	3b42	Youst Cois, Oh	Levi Fox	9/16/19
09/13/2019						9/16/19
09/13/2019						9/16/19
09/13/2019						9-16-19
09/13/2019						
09/13/2019						

Legal Mail Log

Institution:
beci

Date Received by Institution	Inmate Name	Inmate Number	Lock Assignment	Sender's Name & Address	Inmate's Signature of Receipt	Date of Receipt
09/23/2019						9-24-19
09/23/2019						9-24-19
09/23/2019						9-24-19
09/23/2019						9-24-19
09/23/2019						9-24-19
09/23/2019						9-24-19
09/23/2019						9-24-19
09/23/2019						9-24-19
09/23/2019	fox x2	A-733986	3b42	office of the clerk us dist court columbus ohio	Ken Fox	9-24-19
09/23/2019						9-24-19
09/23/2019						9-24-19
09/23/2019						9-24-19



OHIO ATTORNEY GENERAL DAVE YOST
Criminal Justice Section
Section Code 423000
150 E. Gay St., 16 Floor
Columbus, Ohio 43215

Doc #10
Objection to R&R
Doc #8
Doc #53 B4 ~

COLUMBUS
OH 430
11 SEP '19
PM 3 L

9-16-19

U.S. POSTAGE & METS
ZIP 43215
02 JN
100552 5 SEP 11 2019

9-11-16
certificate
of service



Lewis R. Fox, #733-986
Belmont Correctional Institution
P. O. Box 540
St. Clairsville, OH 43950

43950-054040

LEGAL

Attorney General Dave Yost

Report Time: 08:00 AM

Monday

Pass Date: 16-SEP-19

Last Name: FOX

Id: A733986

Issued By

Time

Lock: B/3/0042/B

Job: STUDENT

Destination: legal mail

Dismissed By

Time

Issued By: PACKAGE ROOM - PACKAGE ROOM

Inmate Signature

Time

Pg ID #1059-1061
NO "Exhibit 44" Attached

6 of 7

